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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Plaintiff and Petitioner,

vs.

STATE TAX COMMISSION,
Defendant and Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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JOY OIL COMPANY, LTD.,
a Canadian corporation,
Petitioner and Appellant Below,

vs.

STATE TAX COMMISSION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joy Oil Company, Ltd., a Canadian corporation, hereby respectfully prays for a writ of certiorari addressed to the Supreme Court of the State of Michigan directing it to certify to this Honorable Court for review and determination the record in a certain cause, No. 44,000, entitled "Joy Oil Company, Ltd., vs. State Tax Commission". The transcript of the record in the case, including the proceedings in the Supreme Court of the State of Michigan, is furnished herewith in accordance with the Rules of this Court.

By its decision rendered on May 16, 1948, the Supreme Court of the State of Michigan held that under the general taxation laws of the State of Michigan, an ad valorem tax could be assessed against the petitioner on a quantity of gasoline stored in tanks in the City of Dearborn, Michigan, pending trans-shipment to Canada. The decision of the Supreme Court of Michigan is not yet reported.

Dearborn at a valuation of $78,780.00. A protest was made to the Board of Review that the gasoline was not subject to assessment and tax for the reason that it was a commodity in foreign commerce. The protest was denied. Whereupon on June 7, 1947, an appeal was taken to the State Tax Commission for the reason that commodities in foreign commerce coming temporarily to rest in Michigan pending trans-shipment to a foreign country are not subject to local taxation; that the assessment and the tax levy pursuant thereto was contrary to Section 9, sub-paragraph (5), and Section 10, sub-paragraph (2), Article I of the United States Constitution. On December 30, 1947, the State Tax Commission gave notice denying the appeal (3, 5).

The Joy Oil Company, Ltd., is a Canadian corporation not authorized to do business in the state of Michigan. It owns no property within the state of Michigan except that on the assessment date, April 1, 1947, it had in storage at Dearborn, Michigan, a large quantity of gasoline awaiting trans-shipment to Canada. The Joy Oil Company, Ltd., had purchased 1,500,000 gallons of gasoline from the Midwest Refineries Incorporated of Grand Rapids, Michigan. At the time of purchase, pursuant to Federal statutes, it furnished to the Midwest Refineries Incorporated an Exemption Certificate, duly sworn to, and also a Temporary Exemption Certificate Form 798 U. S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax, and (b) to the carrier in compliance with the Federal Railroad Transportation Act. The purpose was to show that neither of the Federal taxes could be assessed against the gasoline in question since it was a commodity in foreign commerce, thereby the Joy Oil Company, Ltd., benefited by the lower export freight rates (3, 4, 20, 21). The gasoline was transported from Grandville and Alma, Michigan, upon export bills of lading marked "For export to Canada" (23, 24). The total amount of this gasoline was in storage in Dearborn on April 1, 1947, except 50,000 gallons which had been transported by truck over the Ambassador Bridge into Canada until a Federal regulation was issued prohibiting the transportation of any inflammable materials over any in-

ternational bridge. The gasoline remained in storage for about fifteen months because of inability to charter a boat to transport the gasoline to Canada. In July 1947 a boat was chartered and all of the gasoline in question was transported to Canada (4). Excise Form K, Proof of Export, was furnished to Midwest Refineries, Incorporated, the vendor (24, 26).

Following the sustaining of the tax as assessed by the Board of Review of the City of Dearborn by the State Tax Commission, petitioner appealed by certiorari to the Supreme Court of Michigan (1). Leave to appeal was granted. The Supreme Court by its decision of May 16 affirmed the action of the State Tax Commission. It is this decision of the Supreme Court which petitioner seeks to have reviewed.

REASONS RELIED UPON FOR THE GRANTING OF A WRIT OF CERTIORARI

The discretionary powers of this Court are invoked upon the following grounds, being those included among the grounds enumerated in Rule 38 of the Rules of this Court:

First. The Supreme Court of Michigan decided the case in a manner repugnant to Article I, Section 10, of the United States Constitution.

Second. The Supreme Court of Michigan decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that this Court grant a Writ of Certiorari under Judicial Code, Section 237a, as amended by the Act of February 13, 1925, and the Act of January 31, 1928, to be issued out of and under the seal of the Court, directed to the Supreme Court of the State of Michigan, to remove therefrom for review here the record in the cause therein pending, No. 44,090, wherein your petitioner is appellant, and the respondent appellee, that the opinion and judgment of the Supreme Court of Michigan may be reviewed by this

Court, and that the petitioner have such other and further relief in the premises as to this Court may seem equitable and just.

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Appellant Below.
Business Address:
1400 Olds Tower Building,
Lansing 8, Michigan.

Dated: July 19, 1948.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Export-Import Clause of the Constitution of the United States clearly prohibits a state, or any of its subdivisions, from levying any tax on commodities exported, except such as may be necessary for executing the state inspection laws.

This being an ad valorem tax under the general tax laws of the State of Michigan, the exception is not involved. Because there is a single exception, no other qualification of the absolute provision against taxation by a state or its subdivisions was intended.

It was the theory of the Michigan Supreme Court that an interruption of the journey to a point in a foreign country defeated the theory of a continuous journey and that at the point of interruption the commodity was subject to an ad valorem tax. That Court stated in the course of its opinion:

> "If the rail shipments had been billed to Toronto, Canada, the transportation might have been continuous by rail across or under the Detroit River to Canada."

In effect it held that it would be necessary to have a through bill of lading from the point of the original shipment to the point in Canada which was the destination of the shipment. That would require a through shipment by rail. The owner elected to ship by rail to the Lake Port

and Dearborn storage tanks and then by water from Dearborn to Toronto or other points in Canada. A through bill of lading is not possible when there is a transfer from rail to boat. Later in the opinion the Court said:

> "There was no continuity of transportation at Detroit or Dearborn which would require exemption from taxation under the decisions relied upon by appellant."

The Court then concluded its opinion by saying:

> "Under the circumstances of the case at bar, we conclude that there was no continuity of transportation from the point of shipment to destination in foreign commerce."

It is clear that the Supreme Court of the State of Michigan interpreted the cases of this Court to hold that if there was a break in the transportation by transferring the commodity from a rail shipment to a tank and then from a tank to a boat that there was such a lack of continuity of transportation as to render the commodity subject to ad valorem taxation. Such is not the tenor of the Import-Export Clause of the Federal Constitution.

The decision is squarely in conflict with the case of *Carson Petroleum Co. vs. Vial*, 279 U. S. 96, 73 L. Ed. 626. It is on this decision that appellant placed its principal reliance. The Michigan Supreme Court placed principal reliance upon *Coe vs. Errol*, 116 U. S. 517.

In the case of *Carson Petroleum Co. vs. Vial*, supra, it was pointed out that in the case of *Coe vs. Errol* that there were two lots of logs involved. One lot of logs was cut in Maine to be floated down river to Lewiston, Maine, but after starting on the trip the one lot was detained for a *season* in New Hampshire by low water. It was held that this lot of logs was free from local taxation in New Hampshire because they had begun the interstate trip and the cause of detention was to be found in the necessities of the passage, and the trip back to Maine, which was held to be continuous. Evidently the Michigan Supreme Court in reading the decision confused this holding with

the holding on the other lot of logs which had not started its interstate journey.

The Michigan Supreme Court placed emphasis upon the fact that the gasoline was detained in Dearborn, Michigan over a period of fifteen months but the detention was because of the failure of the transportation system, due to a shortage of boats following the war, much the same as the failure of transportation in *Coe vs. Errol* referred to in the *Carson Petroleum Co.* case. In the cited case many other cases were cited which in principle involved the situation before us, although such cases might to some extent be distinguishable upon the facts. Among those was *Champlain Realty Co. vs. Brattleboro*, 260 U. S. 366. In that case logs were gathered in Vermont for a destination in New Hampshire. The court held the logs were not taxable in Vermont, though detained for a considerable time by a boom at Brattleboro to await subsidence of high water in the Connecticut river.

Also the case of *Railroad Commission vs. Worthington*, 225 U. S. 101, where coal from the Ohio mines intended for transportation on the Great Lakes and stored for *some weeks or months* on docks in Cleveland for delivery beyond the lakes was held to be subject to interstate rates. In that case it was said:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment enroute does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

The Court gave the above quotation with approval in *Carson Petroleum Co. vs. Vial*, supra. That paragraph so approved is almost a complete refutation of the entire theory of the Michigan Supreme Court as expressed in its opinion. There was also referred to the case of *Southern*

P. Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498. In that case cotton oil cake and meal destined for export was bought by the intending exporter in Texas, Oklahoma, and Louisiana. It was shipped to him on bills of lading and waybills showing the point of origin in those states and the destination at Galveston. The purchases were made for export, there being no consumption of the products at Galveston. His sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. There was some processing carried on at Galveston. The Court in deciding the case said:

> "The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston, or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, supra, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation'."

Therefore, contrary to the decision of the Michigan Supreme Court, when the gasoline was delivered to the Pere Marquette Railway Co. at Grandville and Alma, Michigan, all bills of lading marked for "Export", it was delivered to a carrier for transportation to a foreign destination.

From that point onward it was at all times a commodity in foreign commerce.

Also in *Carson Petroleum Co. vs. Vial* was cited the case of *Texas & N. O. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111. The question in that case was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know when any particular car of lumber left the starting point into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agent inspected the invoice mailed to and received by him after the shipment. The lumber remained after arrival at the shipping port in the slips or on the dock until a ship chartered by the exporter arrived, then the exporter selected the lumber suited for that cargo and shipped it to its destination. This court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. This Court quoted with approval from the decision as follows:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps of its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

The Court went on to hold that such would not give it a local character. Therefore, the language of the Michigan Supreme Court is refuted that the shipments should have been billed from the point of origin in Michigan to Toronto, Canada, to make the journey continuous. The Court also pointed out that the absence of a definite foreign destination did not alter the character of the shipments; that there was not a break in the sense of the Interstate Commerce Law in the continuity of transportation of lumber to foreign countries by the delay and its transshipment at Sabine.

The circumstances in the case at bar have no essential differences from the circumstances in the case of *Carson Petroleum Co. vs. Vial*. That case is full authority for holding in the case at bar the gasoline was a commodity in foreign commerce and not subject to an ad valorem tax. The decision of the Michigan Supreme Court is in direct conflict with that decision by this Court, and calls for review by this Court of the case at bar.

"It is clear from the above case, upon which we rely, that a through bill of lading is not necessary to continuity of the foreign journey. We can also conclude from that case and the cases cited therein that an interruption of the foreign journey, particularly by storing the commodity for a period of time pending transshipment to the foreign country does not destroy the continuity of the journey, unless the commodity was stored within the United States for such a long period of time that the intent to export was abandoned. In the case at bar, while due to necessities of transportation, the storage extended over months but the commodity was actually transported to the foreign country. The intent to export was never abandoned nor could it have been presumed to have been abandoned.

The decision of the Supreme Court of Michigan is likewise in conflict with the cases of *A. G. Spalding & Bros. vs. William H. Edwards, Collector of Internal Revenue*, 262 U. S. 66, 67 L. Ed. 865, and *Richfield Oil Corp. vs. State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80.

The *A. G. Spalding & Bros.* case involved a Federal tax on baseball bats and balls sold by the manufacturer. A

firm in a foreign country ordered a New York Commission House to buy a quantity of bats and balls for their account. The New York Commission House placed the order with the manufacturer, instructing it to deliver the packages to an exporting carrier in New York for shipment overseas. The goods were delivered to the carrier and an export bill of lading was issued. In due course the goods were shipped overseas. The issue was whether the sale was a step in exportation. In the course of the opinion written for the Court by Mr. Justice Holmes, it was said:

> "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. * * * Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Company (agents), and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Company was solely for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account. * * *"

In the case at bar, it can be equally said that when the gasoline was delivered to the Pere Marquette Railroad Company at Grandville and Alma, Michigan, from which point it was shipped by rail to Dearborn, Michigan, title to the gasoline passed and had the transaction been a domestic one it would have made the appellant subject to a tax, but for the purpose of transportation to a foreign country which was actually carried out and the shipment being upon export bill of lading, it became immune from the ad valorem tax assessed against it.

In the *Richfield Oil Corp.* case, the State of California assessed a sales tax upon gross transactions against gaso

line while it was in storage tanks pending transshipment to New Zealand. The California Supreme Court sustained the tax against the claim that it was repugnant to Article I, Section 10, Clause 2, of the Constitution of the United States. This Court reversed the opinion of the Supreme Court of California in a very exhaustive opinion written by Mr. Justice Douglas which gives a careful review of all cases pro and con involving the question at issue. In the course of the opinion it was said:

> "The questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it.
>
> "The requirement that foreign commerce be involved * * * is met, for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem. There are a few decisions of the Court under Article I, Section 10, Clause 2, which illuminate the problem."

The Court then reviewed many cases involving or touching upon the questions, among them being the *A. G. Spalding Bros.* case. In conclusion Mr. Justice Douglas said:

> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. * * *.
>
> "We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional."

Both of the above cases are clearly in point to the case at bar and the language of the decisions could be easily paraphrased in deciding the case at bar.

The reliance of the Supreme Court of Michigan upon the case of *Minnesota vs. Blasius*, 290 U. S. 1, does not

aid in a proper decision of the case. That case is not in point neither on the facts nor in principle. It was a case in which George Blasius, a trader in livestock at the St. Paul Union Stockyards, St. Paul, Minnesota, purchased eleven head of cattle which were shipped there from a point outside of the State of Minnesota and the consignors had no intent to transport the cattle to any other place than St. Paul, nor did they have any intent that such cattle should be transported to any other place after the sale. Blasius did not have any specific intent to ship them outside of the State of Minnesota, although that may have been the future course in the matter. In fact seven cattle were shipped out of Minnesota on the day of the purchase and four on the following day. This Court in reversing the Supreme Court of Minnesota held that where merchandise is brought into a town from outside of a state and stored in advance of sales and orders taken for the merchandise are filled therefrom, the business is not interstate but local commerce and laws imposing taxes thereon are invalid as interferring with interstate commerce. Aside from the point that the facts are distinguishable from the case at bar, there was involved in that case the Commerce Clause of the United States Constitution which calls for entirely different principles of law than the Export-Import Clause which is involved in the case at bar. It was pointed out in the *Richfield Oil Corp.* case as follows:

> "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. * * * But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was or had ever been an import or export. * * * Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. * * * But the scope of the

limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. * * * It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every state from laying 'any' tax on imports or exports 'without the consent of Congress.'"

The above quotation from the *Richfield Oil Corp.* case clearly renders entirely inapplicable to the case at bar *Minnesota vs. Blasius, supra.*

CONCLUSION

We believe that in the foregoing brief we have raised a substantial Federal question which entitles this case to review by this Court. We believe that the decision of the Supreme Court of Michigan is in conflict with decisions of this Court, particularly *Carson Petroleum Co. vs. Vial*, supra, *A. G. Spalding & Bros. vs. Edwards*, supra, and *Richfield Oil Corp. vs. State Board of Equalization*, supra, which, under the Federal Judicial Code, Section 237(a) and the Rules of this Court, is sufficient ground for review.

Respectfully submitted,

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